BSYNCLIVE SDN BHD v. TECHNOLOGY PARK MALAYSIA CORPORATION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIEF EMRAN ARIFIN JC
[CIVIL SUIT NO: WA-22NCVC-792-10-2019]
16 JUNE 2022

Abstract – *An entire agreement clause in an agreement constitutes a binding agreement between parties, in that, it provides certainty that the parties had agreed that the contract supersedes any previous understandings, documents or other contractual agreements between the parties. Although the word 'contract' or 'agreement' is omitted in the clause, the court must construe the words in its proper context, to give effect to the intention of the parties. Hence, the court, in interpreting a private contract, must look at the factual matrix which formed the background of the transaction and adopt an objective approach.*

CONTRACT: *Agreement – Validity – Whether former agreement superseded by latter agreement – Whether former agreement stamped – Whether parties intended to replace and change obligations under former agreement – Whether obligations of parties substantially changed in latter agreement – Whether both agreements ran concurrently – Whether collateral to one another – Whether entire agreement clause in latter agreement constituted binding agreement – Whether damages proven*

CONTRACT: *Interpretation – Intention of contracting parties – Agreements – Latter agreement contained entire agreement clause – Objective approach – Whether parties intended to replace and change obligations under former agreement – Whether obligations of parties substantially changed in latter agreement – Whether latter agreement superseded former agreement – Whether entire agreement clause in latter agreement constituted binding agreement*

The plaintiff was seeking specific performance of the agreement dated 1 September 2017 or, in the alternative, judgment to the sum of RM22,080,000 for the loss of profits for the period between 2018 to 2022. It was the plaintiff's case that the parties had executed an agreement dated 1 September 2017 wherein the defendant's obligations as stated therein were, *inter alia*, to provide the site ready for the installation of the tents, including providing suitable concrete slab flooring at the site within a period of six months from the date of the agreement. The plaintiff further contended that the defendant had issued a letter of engagement dated 18 September 2017 to appoint the plaintiff to prepare the infrastructure and facilities for the National Innovation and Creative Economy Expo 2017 ('NICE'). NICE was undertaken under the purview of the Ministry of Science, Technology and Innovation ('MOSTI'). The plaintiff alleged that only the NICE event was

undertaken under the agreement and no further event was undertaken at the said site. The plaintiff therefore contended that the defendant had failed to comply with its contractual obligation by failing to install a concrete slab within six months from the date of the agreement. On the other hand, the defendant contended that the plaintiff had not suffered any damage and did not have a valid cause of action against it as: (i) the 1 September 2017 agreement was not the final agreement as the same was not stamped and returned to the defendant by the plaintiff; (ii) the plaintiff's engagement for the NICE event was a one-off agreement wherein the parties were bound by the letter of engagement dated 18 September 2017; and (iii) the parties subsequently negotiated the terms of the agreement which led to the execution of the agreement dated 23 February 2018 which was the final agreement containing material changes and the agreement superseded the terms of the 1 September 2017 agreement. The defendant further contended that, under the 23 February 2018 agreement, the defendant did not have the obligation to install the concrete slab, instead, the terms indicated that the obligation lay with the plaintiff. Hence, the issues for determination by the court, *inter alia*, were: (i) whether the 1 September 2017 agreement was a valid and binding instrument; (ii) which agreement was applicable and whether it was possible for the two agreements to run concurrently; (iii) whether the defendant breached the terms of the agreement; and (iv) if the agreement dated 1 September 2017 was valid and enforceable, whether the plaintiff had proved its case for damages against the defendant.

Held (dismissing plaintiff's claim with costs):

(1) The plaintiff had shown evidence that the 1 September 2017 agreement was executed by its representatives. However, there was no evidence that the fully executed instrument, that was duly signed by both parties, was returned to the defendant and there was no evidence that it was stamped by the plaintiff. Under the 1 September 2017 agreement, the duty to have the document stamped lay with the plaintiff. It was the intention of the plaintiff to replace and change the obligations that appeared in the 1 September 2017 agreement, which was eventually agreed to between the parties. (paras 24, 26 & 31)

(2) The law concerning collateral contracts is specific and is usually applicable where representations were made by a contracting party to induce a party to enter the contract. Once parties agreed to replace and change the material terms of the agreement, the earlier obligations are no longer applicable. Based on the sequence of events, the parties had intended for the 23 February 2018 agreement to constitute the amended version of the earlier agreement wherein the agreement contained substantial changes to the obligation of parties. Therefore, the contract dated 1 September 2017 was superseded by the subsequent contract dated 23 February 2018. (paras 28, 32, 54 & 56)

(3) The hosting of the NICE event did not support the argument that the two agreements ran concurrently. There were no fees charged by the plaintiff to its clients that would be shared between the plaintiff and the defendant for the NICE event. In fact, the NICE event was undertaken at the expense of MOSTI and the plaintiff was paid for the work undertaken. (paras 50 & 52)

(4) The agreement dated 23 February 2018 contained an entire agreement clause, which provided, among others, that the '… agreement supersedes all proposal, negotiations, commitments and understanding with respect to the subject matter hereof made between the parties hereto prior to the execution of this agreement.' The entire agreement clause constitutes a binding agreement between parties, in that, it helps to provide certainty that the contract in question constitutes an entire agreement between the parties and that the contract supersedes any previous understanding, documents or other contractual agreement between the parties (*Common Ground TTDI Sdn Bhd v. Ken TTDI Sdn Bhd*). The 23 February 2018 agreement replaced the previous contract and extinguished the obligations that appeared in the earlier contract. The latter agreement was the final contract between the parties. (paras 33, 36 & 42)

(5) In interpreting a contract, the court is entitled to look at the factual matrix which forms the background to the transaction which includes all material reasonably available to the parties and the court must disregard any part of the background that was declaratory of subjective intent only. The court should adopt an objective approach when interpreting a private contract. In the 23 February 2018 agreement, the plaintiff agreed that it would 'design, supply and install the structure at the site'. The obligation by the defendant to put in place a suitable concrete slab flooring at the site was removed. The material changes indicated that objectively, the agreement dated 23 February 2018 replaced the earlier agreement and the latter agreement was still binding and effective on the date when the plaintiff instituted the proceedings against the defendant. (paras 41 & 45)

(6) The allegation that the defendant had proposed to give the site to be used by a third party was not supported by any evidence. The site was still left vacant as of to date and was not made available to any third party. The plaintiff also failed to produce any evidence of any event planned for the said site in any form from the date of the agreement, 23 February 2018, to the date of filing of this suit. Therefore, the defendant had not committed any breach of the terms of the applicable contract between the parties. (paras 64-66)

(7) The plaintiff's claim of special damages in the sum of RM460,000 was not supported by any evidence that the plaintiff had incurred the said expenses. The expenses and costs incurred were merely based on quotations and the evidence of the actual amount paid by the plaintiff

was not produced. Further, the alleged claim for loss of profits of RM22,080,000 was merely a profit projection, which was merely speculative at best. The plaintiff had thus failed to prove any of its claim for damages. (paras 74 & 76-79)

Case(s) referred to:
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Common Ground TTDI Sdn Bhd v. Ken TTDI Sdn Bhd; Common Ground Works Sdn Bhd & Ors (Third Party) [2021] 1 LNS 1709 HC ***(refd)***
Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***
Forest Steel Sdn Bhd v. Iconic Gateway Sdn Bhd & Anor And Another Appeal [2020] 7 CLJ 19 CA ***(refd)***
Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal [2007] 3 CLJ 413 CA ***(refd)***
Inntrepreneur Pub Co v. East Crown Ltd [2000] 2 Lloyd's Rep 611 ***(refd)***
Investors Compensation Scheme Ltd v. West Broomwich Building Society [1998] 1 All ER 96 ***(refd)***
JJ Savage & Sons Pty Ltd v. Blakney [1970] 119 CLR 435 ***(refd)***
Macronet Sdn Bhd v. RHB Bank Berhad [2002] 4 CLJ 729 HC ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Ravennavi Spa v. New Century Shipbuilding Co Ltd [2007] EWCA Civ 58 ***(refd)***
Sime UEP Properties Bhd v. Woon Nyoke Lin [2002] 3 CLJ 719 CA ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***
Taki Engineering Sdn Bhd v. Dynasty Streams Sdn Bhd [2015] 1 LNS 1503 CA ***(refd)***
Tan Chong & Sons Motor Co Sdn Bhd v. Alan McKnight [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 FC ***(refd)***
Tan Swee Hoe Ltd v. Ali Hussain Bros [1979] 1 LN 113 FC ***(refd)***
Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh [2009] 6 CLJ 371 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74
Evidence Act 1950, s. 126

For the plaintiff - Amin Othman; M/s Hafarizam Wan & Aisha Mubarak
For the defendant - Loo Peh Fern, Elly Rawaida (PDK) & Wan Nabil Ikram (PDK); M/s Skrine

Reported by S Barathi

JUDGMENT

Mohd Arief Emran Arifin JC:

Introduction

The Prayers Sought By The Plaintiff

[1] The plaintiff is seeking for the specific performance of the agreement dated 1 September 2017 or in the alternative judgment to the sum of RM22,080,000 for the loss of profits for the period between 2018 to 2022.

[2] It also seeks the following orders:

(i) Special damages to the sum of RM460,000 for the alleged incurred by the plaintiff.

(ii) Injunction to prevent the defendant from terminating the aforesaid agreement dated 1 September 2017 and an injunction to prevent the defendant from entering into any other agreement with any third party concerning the same subject property.

(iii) Costs and interests.

Summary Of The Plaintiff's Claim

[3] The plaintiff alleges that parties had executed an agreement dated 1 September 2017 that contains the following terms:

> PERJANJIAN KERJASAMA (COLLABORATION AGREEMENT BERTARIKH 1.9.2017)
>
> Plaintif dan Defendan telah memasuki satu Perjanjian Kerjasama (Colaboration Agniamant) bertarikh 1.9.2017 (selepas ini dirujuk sebagai "CA tersebut"), di mana terma-terma yang relevan dalam CA tersebut adalah seperti berikut.
>
> (i) WHEREAS:
>
> A. The Parties wish to form a strategic collaboration with each other by combining their respective expertise and resources to jointly participate in managing and operating any events organised by either party on a parcel of land owned by TPM, known as PT 13824, Mukim Petaling, Kuala Lumpur (hereinafter referred to as "the Site") described in Appendix 1 in this Agreement and which delineated and shaded in rod in the Site map annexed hereto in Appendix 1 (the Proposed Collaboration"]
>
> B. The Parties wish now to formalise their intentions in the Proposed Collaboration subject to the terms and condition as contained herein.
>
> (ii) COMMENCEMENT
>
> 1.1 The Proposed Collaboration shall be for a period of five (5) years commencing from date of this Agreement (hereinafter referred to as the Term)
>
> 1.2 ...
>
> (iii) REVENUE SHARING AND PAYMENT
>
> 2.1 In consideration of the Proposed Collaboration, the Parties hereby agree that BSYNCLIVE shall pay to TPM twenty percent (20%) of the fees charged to their clients (hereinafter referred to as "Revenue Shares) for each events carried out at the Site throughout the Term.
>
> 2.2 Revenue Share calculation shall be based on BSYNCLIVE's total fees charged to from their clients for each event. A copy of each contract, purchase order and/or quotation) entered by BSYNCLIVE with its clients

A shall be given to TPM for reconciliation and record purposed within seven (7) days from the execution of each contract, purchase order and/or quotation.

2.3 ...

2.4 ...

B (iv) OBLIGATIONS

3.1 The responsibilities and obligations of the respective Parties under this Agreement and the Proposed Collaboration shall be as follows:

TPM

C (i) To provide the Site ready for the installation of the tents, including providing suitable concrete slab flooring at the Site within a period of six (6) months from the date of this Agreement

(ii) To ensure that the Site is clear from any obstruction for the purpose of BSYNCLIVE's usage; and

D (iii) To assist BSYNCLIVE with necessary assistance to ensure smooth operation of the Site, tents and events to be held at the Site.

BSYNCLIVE

(i) To design, supply and install suitable tents at the Site;

E (ii) In relation to the events to be conducted at the Site, BSYNCLIVE shall

(a) Apply for license and/or permit imposed by the relevant authorities for the purpose of organising any event at the Site and undertakes to comply with all the terms and conditions imposed under such

F licenses and to keep TPM Directors and its representative fully indemnify at all time against any non-compliance accordingly.

(b) ...

3.2 BSYNCLIVE shall not make any alterations or additions to the internal constructions or external appearance of the Site, or do anything

G not particularly stipulated herein for the purpose of promoting, branding, or positioning of the Site without the consent of TPM/

(v) TERMINATION AND CONSEQUENCE

5.1

H 5.2 Notwithstanding Clause 5.1, TPM reserves the right to terminate this Agreement at any time without cause and for any reason by giving BSYNCLIVE seven (7) days written notice. TPM shall not in any manner whatsoever be liable to BSYNCLIVE for any interest, costs, expenses, damages or losses suffered (direct or Indirect) of whatsoever nature incurred or which may be incurred by BSYNCLIVE by reason of such

I termination. The exercise of its rights under this Clause 5.2 by TPM shall be an addition and without prejudice to any other rights and remedies available to TPM under this Agreement or at law.

5.3 ...

(vi) ENTIRE AGREEMENT

16.1 The terms and conditions contained herein shall constitute the sole and entire agreement and understanding among the Parties hereto with respect to the subject matter of this Agreement, and supersedes all proposals, negotiations, commitments and understandings with respect to the subject matter hereof made between the Parties hereto prior to the execution of this Agreement.

[4] The plaintiff further contends that the defendant had issued a letter of engagement dated 18 September 2017 to appoint the plaintiff to prepare the infrastructure and facilities for the National Innovation and Creative Economy Expo 2017 (NICE 2017). NICE was undertaken under the purview of the Ministry of Science, Technology and Innovation from 12 to 16 October 2017.

[5] It also contends that only the NICE event was undertaken under the said 1 September 2017 agreement and no further event was undertaken at the said site.

[6] The plaintiff alleges that the defendant had failed to comply with its contractual obligation by failing to install a concrete slab within six months from the date of the said agreement and the defendant continues to breach the said contractual obligation.

[7] Demands were made for the defendant to comply with the said contractual obligation by emails dated 23 January 2019, 11 February 2019 and 5 March 2019. No replies were allegedly forthcoming from the defendant.

Summary Of The Defendant's Defence

[8] The defendant contends that the 1 September 2017 was not the final agreement executed between the parties for the following reasons:

(i) The said agreement was executed by the defendant but was not stamped and returned to it by the plaintiff.

(ii) The defendant did engage the plaintiff for the NICE event, but this was a one-off agreement. This event went ahead without the agreement being fully executed between parties and the terms of the relationship between parties for the said event were bound by the terms of the letter of engagement dated 18 September 2017.

(iii) Parties had subsequently negotiated the terms of the agreement after the NICE event which led to the execution of the agreement dated 23 February 2018. This was the final agreement that was duly stamped and sent to the defendant by the plaintiff as seen in the letter dated 13 March 2018.

A (iv) The 23 February 2018 contained material changes and superseded the terms of the alleged agreement dated 1 September 2017.

[9] The defendant also contends that under the terms of 23 February 2018, the defendant did not have an obligation to install the concrete slab. Instead, the term of the agreement indicates that the obligation to install the structure B lies with the plaintiff and that the obligation of the defendant is clearly stated in cl. 3.1. This clause does not contain any such obligation as suggested by the plaintiff.

[10] The defendant further contends that the plaintiff has not suffered any damage and does not have a valid cause of action against the defendant. C

Preliminary Issues

[11] This court had on various case managements directed parties to exchange documents and comply with the directions given. The plaintiff however produced a new bundle of documents on the eve of the trial that was D only filed on 18 March 2022 and 22 March 2022. Due to the said delay and failure to comply with the directions given by this court, I decided not to allow the said bundle into evidence.

[12] I also did not allow parts of the witness statements filed by the plaintiff as they were objected to by the defendant's counsel and were issues that were E not pleaded by the plaintiff in its statement of claim. It is trite law that parties are bound by their pleaded case and should not be allowed to raise issues that are new that may catch the defendant by surprise.

[13] It is also important that I deal with the issue of the admissibility of the email that contained the communication between the plaintiff and its F solicitors, Mr Wajdi bin Mohamad of Messrs Wajdi Mohamad Yusri & Co. I had allowed this evidence to be tendered on the ground that the said email was forwarded by the plaintiff to the defendant without any reservations.

[14] Therefore, I opine that the plaintiff had waived any right to privilege G as provided for in s. 126 of the Evidence Act 1950. Having disclosed the said communication to the defendant, the plaintiff cannot now rely on the said proviso to prevent the said document from being utilised by the defendant at trial. This is clear as the emails between the solicitor and client were forwarded to the defendant's representative by the plaintiff's representative H as part of the negotiation process between parties. It was the plaintiff's own representative that had sent the chain of emails to the defendant's representative. Thus, breaking the legal privilege of the communications made between the solicitor and his client.

[15] Legal privilege once waived by the client renders the privileged I communication available to be referred to by the other side. I refer to *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405.

Trial On 22 March 2022, 23 March 2022 And 4 April 2022

[16] The trial for this suit commenced on 22 April 2022 and ended on 4 April 2022. The plaintiff called the following witnesses:

(i) Adam Sofian bin Mazlan

(ii) Imran Shah bin Jelani

(iii) Zulkifli Fitri bin Ismail

(iv) Dato Ir Hj Mohd Azman bin Hj Shahdin

[17] The defendant only called Nik Najihah binti Nik Wan.

Issues Before This Court

[18] The issues before this court are relatively straightforward. They are as follows:

(i) Whether the 1 September 2017 agreement is a valid and binding instrument?

(ii) Which agreement is applicable and whether it is possible for these two agreements to run concurrently as suggested by the plaintiff?

(iii) What are the obligations of parties? Did the defendant breach the terms of the agreement?

(iv) If the agreement dated 1 September 2017 is valid and enforceable, whether the plaintiff has proven its case for damages against the defendant.

[19] I will deal with each of the above-referred issues in the following paragraphs.

Decision Of This Court

Whether The Agreement Dated 1 September 2017 Is A Valid And Binding Instrument?

Which Agreement Is Applicable And Whether It Is Possible For These Two Agreements To Run Concurrently As Suggested By The Plaintiff?

[20] The first issue concerns whether the said 1 September 2017 is a binding instrument.

[21] The defendant admits that it had executed the agreement dated 1 September 2017 but contends that it was not the final agreement. As I have said earlier, the defendant contends that its representative did execute the said agreement and had sent a copy to the plaintiff for their further action *ie*, execution and stamping.

[22] However, the said instrument was not returned by the plaintiff and was subsequently followed by further negotiations between the plaintiff's then solicitors and the defendant's representative to make further amendments to the said instrument.

[23] I find that the evidence does indicate that the agreement was executed by the defendant's representative on 18 September 2017. This appears in the version of the document kept in the records of the defendant with the handwritten note "Good 18 September 2017" and the evidence of Nik Najihah. There is no other documentary evidence that contradicts the said position.

[24] The issue is whether did the plaintiff then put its signature to the said instrument to render the said document binding on parties. I find that the plaintiff has shown evidence that the said agreement dated 1 September 2017 was executed by its representative as seen in exh. P3 tendered by the plaintiff.

[25] I also find that the said instrument was referred to by the defendant in its letter of engagement dated 18 September 2017 where the defendant stated:

(i) "We refer to the above and the collaboration agreement between Technology Park Malaysia Corporation Sdn Bhd ("TPM") and Bsynclive Sdn Bhd dated 1 September 2017".

(ii) "This engagement shall be subject to the terms herein and the terms and conditions of the collaboration agreement. All the provisions of the collaboration agreement shall remain the same and be in full force and effect as between the parties."

[26] At the same time, I find that there is no evidence that the fully executed instrument, that was duly signed by both parties, was returned to the defendant and there is no evidence that it was stamped by the plaintiff. Under cl. 22.1 of the 1 September 2017 agreement, the duty to have the document stamped lies with the plaintiff.

[27] Therefore, I find that the parties did execute the 1 September 2017 but the said instrument was not stamped, and a copy was not returned to the defendant for its records.

[28] This however does not mean that the 1 September 2017 agreement is binding between parties on the date when the demand was issued by the plaintiff's solicitors to the defendant. It also does not mean that the two agreements could run concurrently as suggested by the plaintiff and it does not mean that the defendant had breached its terms. I am of the opinion that this contract dated 1 September 2017 was superseded by the subsequent contract dated 23 February 2018 for the reasons stated below.

[29] In coming to this determination, I have considered the following events and the following documentary evidence that was produced by parties:

(i) The emails exchanged between representatives of the plaintiff and the defendant dated 3 November 2017 that included the email chain between the plaintiff and its solicitors, Mr Wajdi bin Mohamad of Messrs Wajdi Mohamad Yusri & Co clearly indicate that the parties were negotiating the terms of the collaboration agreement and that the plaintiff wanted to make amendments to the said instrument.

(ii) The email from Imran of Bsynclive to Syed Mohd Faidz, for the defendant dated 15 December 2017 attaching the draft collaboration agreement for the defendant's perusal.

(iii) The letter dated 13 March 2018 from the plaintiff to the defendant forwarding a copy of the agreement dated 23 February 2018 that was duly stamped.

(iv) The letter of demand issued by Messrs Wajdi Mohamad Yusri & Co dated 21 June 2019 referring to the agreement dated 23 February 2018.

[30] In the circumstances, I find that the parties had agreed to amend the original agreement dated 1 September 2017. Parties had agreed and negotiated the terms again as seen in the above facts enumerated in paras. 29(i) to 29(iii) above and agreed to change the terms of the 1 September 2017 agreement to those appearing in the subsequent agreement dated 23 February 2018. This new agreement was also stamped by the plaintiff and a copy was duly forwarded to the defendant for its records.

[31] When I peruse the said emails as highlighted earlier, I find that the amendments were in fact made and suggested by Messrs Wajdi Mohamad Yusri & Co. The said firm was representing the plaintiff at the aforesaid time. It was therefore clearly the intention of the plaintiff to replace and change the obligations that had appeared in the earlier agreement dated 1 September 2017. Under such circumstances, I cannot accept that the previous agreement continued as it was the plaintiff that had wanted to change the obligation of parties, appointed solicitors to make those changes and this was eventually agreed between parties.

[32] Furthermore, the sequence of events as I have highlighted earlier, the parties did intend for the 23 February 2018 to constitute the amended version of the earlier agreement dated 1 September 2017. The agreement dated 23 February 2018 contained substantial changes to the obligation of parties which are reproduced as follows:

No.	Collaboration Agreement 2017	Collaboration Agreement 2018
1	Obligations 3.1 The responsibilities and obligations of the respective parties under this Agreement and the Proposed Collaboration shall be as follows: TPM i. To provide the Site ready for the installation of the tents, including providing suitable concrete slab flooring at the Site within a period of six (6) months from the date of this Agreement;	Obligations 3.1 The responsibilities and obligations of the respective Parties under this Agreement and the Proposed Collaboration (at each Party's own cost and expense) shall be as follows: TPM i. To provide the Site ready for the installation of the Structure;

[33] Secondly, it cannot be said that the agreement dated 1 September 2017 and 23 February 2018 are collateral to one another. The agreement dated 23 February 2018 contain an entire agreement clause which is reproduced herein:

> *Clause 14 Entire Agreement*
>
> *14.1 The terms and conditions herein contained shall constitute the sole and entire agreement and understanding among parties hereto with respect to the subject matter of this Agreement and supersedes all proposal, negotiations, commitments, and understandings with respect to the subject matter hereof made between the Parties hereto prior to the execution of this Agreement.*
>
> (emphasis added)

[34] I refer to the leading English case on this area, the decision of Lightman J in *Inntrepreneur Pub Co v. East Crown Ltd* [2000] 2 Lloyd's Rep 611, relevant parts of which is reproduced herein:

> The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth, and finding, in the course of negotiations, some (chance) remark or statement (often long forgotten or difficult or recall or explain) on which to found a claim such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting partes posed by the ned which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the fill contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly, any promises or assurances made in the course of negotiations (which in the absence of such a clause might have effect as

a collateral contract) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence as is suggested in Chitty on Contract ... : it is to denude what would otherwise constitute a collateral warranty of legal effect.

[35] I also refer to the decision of our courts in *Macronet Sdn Bhd v. RHB Bank Berhad* [2002] 4 CLJ 729*;* [2002] 3 MLJ 11, *Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh* [2009] 6 CLJ 371 and in *Common Ground TTDI Sdn Bhd v. Ken TTDI Sdn Bhd; Common Ground Works Sdn Bhd & Ors (Third Party)* [2021] 1 LNS 1709.

[36] Mohd Nazlan Mohd Ghazali J in *Common Ground TTDI Sdn Bhd v. Ken TTDI* (*supra*) had this to say on this issue:

[56] Given the presence of an entire agreement clause in a contract like this Tenancy Agreement, parties to the same are bound by it since such entire agreement clause constitutes a binding agreement between parties where the full contractual terms are to be found in the documents containing the clause. It helps provide certainty that the contract in question constitutes the entire agreement between the parties. It also means that the parties agree that the contract supersedes any previous understandings, documents or other contractual arrangements between the parties.

[57] I have in the case of *Teoh Chin Kee & Anor v. Messrs SB Teh & Ho (sued as firm) & Anor* [2018] 1 LNS 688; [2018] 5 AMR 400 summarised the effects of an entire agreement clause in this manner:

[46] Thus in the High Court decision in *Macronet Sdn Bhd v. RHB Bank Berhad* [200214 CLJ 729; [2002] AMEJ 0105; [2002] 3 MLJ 118, Abdul Aziz Mohamad J (later FCJ) in dealing with a similar clause held instructively:

> The effect of that clause is that the agreement, because it constituted the whole agreement, could not be varied for any reason or under any circumstances except by another agreement in writing.

[47] This ruling in *Macronet* has also been applied in subsequent cases, including by the Court of Appeal in the case of *Network Pet Products (M) Sdn Bhd v. Royal Canin SAS & Anor* [2015] 2 CLJ 530; [2015] 1 AMCR 553 where the argument by one of the parties to a distributorship contract alleging the existence of an oral partnership agreement was rejected by reason of the presence of an entire agreement clause in the distributorship contract. In addition, the Court of Appeal in *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [20051 2 CLJ 596; [2005] 3 AMR 378; [2005] 3 MLJ 585 also ruled to similar effect.

[37] I appreciate that the plaintiff contends that the word "contract" or "agreement" does not appear in the said clause and that the said clause should only preclude "proposal, negotiations, commitments and understandings" between parties.

[38] However, I do not believe that would be the appropriate interpretation to be given to the said clause. I refer to the decision of Moore-Brick J in *Ravennavi Spa v. New Century Shipbuilding Co Ltd* [2007] EWCA Civ 58, where he stated:

> The effect of an entire agreement clause ... must depend primarily on its terms, since it is the language chosen by the parties to express their agreement (wherever it appears) which, construed in its proper context, provides the primary source of their intentions.There may be circumstances, of course, in which the court can be satisfied that a clause of that kind, although apparently, crouched in language wide enough to encompass the particular matter on which one or other party seeks to rely, was not intended by the parties to operate in the way in which its terms would suggests, but any such conclusion must be borne out by the particular circumstances of the case.

[39] I have also taken into consideration the trite principles of interpretation of the terms of contract as laid down in the famous case of *Investors Compensation Schemes v. West Broomwich Building Society* [1998] 1 All ER 96 that was adopted by the Court of Appeal in *Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413 and by the Federal Court in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177. I reproduce the relevant portion of the judgment of Lord Hoffman concerning contract interpretation:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected by way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and in this respect, legal interpretation differs from the way we interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the documents is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945.

(5) the 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one were to nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly would not have had. Lord Diplock made this point more vigorously when he said in *Antaios Campania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201:

> If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense.

[40] It would be remiss of me not to quote the decision of the Federal Court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 at p. 296 (CLJ); [42] 620G (MLJ).

[41] Gopal Sri Ram FCJ, delivering the judgment of the court stated:

> Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix which forms the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an **objective** approach when interpreting a private contract.
>
> (emphasis added)

[42] Therefore, having taken into account the chronology of events as stated in para. 29 above that constitutes the background facts that led to the execution of the agreement dated 23 February 2018 and the words that appear in the said instrument in particular cl. 14, I am of the opinion that the agreement dated 23 February 2018 replaces the previous contract and extinguishes the obligations that appeared in the earlier contract. The latter

A agreement dated 23 February 2018 is the final contract between parties. One cannot then refer to the earlier instrument to determine the obligations of parties once the new agreement is executed.

[43] I have also taken into consideration the material changes that appear in the agreement dated 23 February 2018 compared to the earlier version
B dated 1 September 2017.

[44] The preamble to the 23 February 2018 indicates that the plaintiff has undertaken a site inspection of the site and agreed that it is suitable for the purpose of the event and agreed that the site is accepted on as is basis. This
C did not appear in the 1 September 2017.

[45] Secondly, most materially, in the 23 February 2018 agreement, the plaintiff agreed that it will "design, supply and install the structure at the site". The obligation by the defendant to put in place a suitable concrete slab flooring at the site was removed. Therefore, the earlier agreement was
D substantially changed, and the parties agreed that it was no longer the obligation of the defendant to install a concrete slab at the site for tents to be installed. Instead, the plaintiff agreed that the site is received by it on an as-is-where-is basis and that the plaintiff will install the required structure at the site.

E **[46]** This material change indicates to me that objectively the agreement dated 23 February 2018 replaced the earlier instrument dated 1 September 2017. It is the agreement dated 23 February 2018 that is still binding and effective on the date when the plaintiff instituted proceedings against the defendant.

F **[47]** The plaintiff relies on the evidence of Zulkifli Fitri bin Ismail, the former business development personnel of the defendant to support its contention that the agreement dated 1 September 2017 is still applicable and that it should be read concurrently with the new agreement dated 23 February 2018.

G **[48]** I find that such contention is misplaced. As seen in the earlier cases, the interpretation of the contract is a task that must be taken objectively by the court based on the terms of the contract. The background facts assist the court in interpreting the terms when they are ambiguous or vague. However, when the terms are crystal clear, these background facts cannot be used to
H contradict or put a spin to the clear words that appear in the written instrument. Therefore, I find that the evidence of Zulkilfi bin Ismail is unhelpful on this issue.

[49] I also find that the evidence of Adam Sofian bin Mazlan and Imran Shah bin Jelani are unhelpful. After comparing the evidence of both
I witnesses, especially the statements contained in the witness statements, I find that the witness statements of the aforesaid individuals were prepared by solicitors and do not represent the actual words of the said witnesses. The

two witness statements were word- for-word copies of one another. The only difference was the identification of the witnesses *ie*, their name, address, and para. 12 of Encik Imran's witness statement. These two individuals were speaking as if they were identical twins. I, therefore, reject the evidence of these two individuals as they are unreliable and to this court appears to be that of the work of the solicitor.

[50] The plaintiff further contends that this concurrent existence of the 23 February 2018 and 1 September 2017 is shown by the NICE event that was hosted by the defendant under the purview of MOSTI. It refers to the letter of engagement dated 18 September 2017 and argues that parties had rushed the said agreement to prepare itself for the NICE event and therefore this proves that the agreement continues concurrently with the 23 February 2018 agreement. Whereas, under the 1 September 2017 agreement and even under the 23 February 2018, the fees will be collected by the plaintiff for the events it hosts from its client, and this would be eventually shared between parties. I find that the hosting of the NICE event does not support the argument that these two agreements run concurrently as suggested by the plaintiff.

[51] I find that this is a convoluted reading of the terms of the agreements and the letter of engagement. Although the letter of engagement appears and did refer to the 1 September 2017 agreement, it must be noted that the event does not actually fall within the exact purview of the collaboration between the plaintiff and the defendant.

[52] It is clear to this court that the event is undertaken by MOSTI and not by the plaintiff. There are no fees that are charged by the plaintiff to its clients that will be shared between the plaintiff and the defendant for the NICE event. The NICE event was undertaken at the expense of MOSTI, and the plaintiff was paid for the work undertaken in accordance with Appendix I of the said letter of engagement. This also appears in the quotations issued by the plaintiff to the defendant.

[53] Even if I were to take the plaintiff's case at its highest and agree that the MOSTI event falls within the purview of the 1 September 2017, this will only mean that the said contract was valid pertaining to the said event. The issue before me does not concern the MOSTI event but concerns events that occurred after the execution of the 23 February 2018 agreement that was also duly stamped. It is this agreement that is binding on parties. It is wrong for the plaintiff to now rely on the agreement dated 1 September 2017 that is no longer applicable.

[54] This court notes that the plaintiff also argues that the two contracts should be read concurrently based on the principle of collateral contract. With due respect, this reliance is misplaced. The law concerning collateral contracts is specific and is usually applicable where representations were made by a contracting party to induce a party to enter the contract.

[55] I refer to the test laid down in *JJ Savage & Sons Pty Ltd v. Blakney* [1970] 119 CLR 435 and our leading case of *Tan Swee Hoe Co Ltd v. Ali Hussain Bros* [1979] 1 LN 113; [1980] 2 MLJ 16 and *Tan Chong & Sons Motor Co Sdn Bhd v. Alan McKnight* [1983] 1 CLJ 77; [1983] CLJ (Rep) 394.

[56] Given the above, I find that the agreement dated 23 February 2018 replaces or extinguishes the obligation contained in the earlier agreement dated 1 September 2018. Once parties agreed to replace and change the material terms of the agreement, the earlier obligations are no longer applicable. I reject the argument of the alleged existence of two concurrent agreements as proposed by the plaintiff. I opine that the plaintiff's argument that the two agreement exists side by side does not hold water.

What Are The Obligations Of Parties? Did The Defendant Breach The Terms Of The Agreement?

[57] Having found that the agreement dated 23 February 2018 supersedes the earlier agreement dated 1 September 2017, I opine that parties are required to ensure that they act in accordance with the terms that appear in the 23 February 2018 instrument.

[58] Therefore, the defendant is not required to ensure that the site is ready for the installation of the structure. I find that as parties had agreed to remove the requirement that the defendant provides a suitable concrete slab flooring at the site, this requirement no longer exists as of 23 February 2018. More so when the preamble of the agreement clearly indicates that the plaintiff accepts the site on an as-is where is basis and that it had undertaken its own inspection finding that the site is suitable for the purpose of the events to be hosted thereat.

[59] Furthermore, I find that cl. 1.1 of the 23 February 2018 agreement states that the collaboration period shall be for a period of five years commencing from the completion of the structure. Therefore, this agreement will start its operation once the plaintiff installs the structure as required pursuant to cl. 3.1.

[60] Another important fact that I have considered is that before the agreement dated 23 February 2018 was executed, the plaintiff had failed to provide any concrete slab at the site from 1 September 2018 to February 2018. Under the earlier agreement dated 1 September 2017, the defendant is required to build the said concrete slab within six months from the date of the said agreement *ie*, by February 2018.

[61] Therefore, having made alterations to the said term, removing it altogether in the new instrument after the failure of the defendant to complete the said obligation within earlier time frame, I find that parties had agreed that this obligation would no longer be required of the defendant. If the

plaintiff had wanted the defendant to continue with its obligation to build the said concrete slab, the plaintiff should have then ensured that the said clause continues to appear in the new written instrument.

[62] I find that the interpretation of the agreements as suggested by the plaintiff is erroneous and contrary to the instruments and the conduct of the parties.

[63] I prefer the evidence presented by the witness for the defendant as her statements are consistent with contemporaneous documents. As I said earlier, the testimony of the plaintiff's witnesses especially those of Adam Sofian bin Mazlan and Imran Shah bin Jelani, are not only inconsistent with contemporaneous documents, (*ie*, the conduct of their own solicitors in amending the agreement to reflect the changes demanded by them) the witness statements were prepared by solicitors. I find it surprising that the two witness statements were carbon copies of one another. This indicates that they were the statements of the solicitors and not that of the said witnesses. Therefore, I do not find that the evidence of the plaintiff's witnesses is credible and reject the same.

[64] On the allegation that the defendant had proposed to give the site to be used by a third party, I find that the said allegation is not supported by any evidence. The defendant's witness, Nik Najihah, gave evidence stating that the site is still vacant and has not been delivered to any third party. I note that Encik Zulkilfi bin Ismail, the former business development manager of the defendant suggests that the site has been delivered to a third party, but this was not supported by any documentary evidence before me. I, therefore, find that the site is still left vacant even as of to date and was not made available to any third party.

[65] Another important feature that was missed by the plaintiff concerns its own obligations. The plaintiff has also failed to produce any evidence of any event planned for the said site in any form from the date of the agreement, 23 February 2018 to the date of filing of this suit. There is no evidence of any correspondence or email from the plaintiff indicating of any of their plans to hold any events at the said site. This is even applicable to the earlier agreement dated 1 September 2017. The averments by the plaintiff and its witnesses are mere conjectures not supported by any documentary evidence or any credible evidence.

[66] Therefore, I cannot find that the defendant had committed any breach of the terms of the applicable contract between parties. The complaint concerning the installation of the concrete slab was taken out by the plaintiff's own solicitors when it amended the agreement as reflected in the 23 February 2018 agreement. Despite knowing very well that the concrete slab was not installed, they agreed to amend and change the terms to remove the said obligation. No demand was ever made for the said concrete slab to

be installed before the 23 February 2018 was executed. This to me clearly indicates that the contract dated 1 September 2017 is no longer binding and has been superseded by the 23 February 2018 agreement.

[67] Given the above, I find that the defendant did not breach any of its obligations under the terms of the agreement dated 23 February 2018.

Whether The Plaintiff Did Suffer Any Damage As Claimed?

[68] As I have found that the defendant did not breach the terms of the agreement dated 23 February 2018, this issue now becomes academic.

[69] However, even if I am wrong on the above, I opine that the plaintiff has failed to prove any of its alleged damages claimed in its statement of claim.

[70] It is trite law that the plaintiff bears the burden of proof to show that it suffered the damages that it claims against the defendant. I refer to the decision of Edgar Joseph Jr J (as he then was) in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 in applying s. 74 of the Contracts Act 1950 where he stated:

> A word now about general principle. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be recoverable. The principle of remoteness of damage is a limiting principle of policy and the principles applicable in contract and tort are not the same. (See *Koufos v. Czarnikow Ltd (The Heron)* [1969] 1 AC 350. In the last mentioned case, the House of Lords disapproved of the foreseeability test propounded by Lord Asquith in the case of *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 KB 528.
>
> In the *Victoria Laundry* case, the plaintiff who were buyers of a boiler for their laundry and dry cleaning business which was delivered late and in breach of contract by the defendants, were held able to recover "ordinary" loss of profits, but not loss of profits from an extraordinarily lucrative contract of which the defendant knew nothing.
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> In the *Pegasse* [1981] TLR 175, 182, Goff J (as he then was) referred to the principles aforesaid and commenting on the judgments of their Lordships in the *Heron* (*ibid*), said this at p. 182:
>
> > ... the thread running through the speeches is that the damages must have been within the contemplation of the defendant, not in the sense that they were probable (which would be too strict a test) but rather in the sense that there was a serious possibility of their occurrence or that they were not unlikely to occur ...
>
> Now, the normal measure of damages for non-delivery of goods sold is the difference between the market price and the contract price but this rule applies only where there is an "available market", that is to say, that the buyer should be able to go out and buy equivalent goods.

In the case of fob or cif contracts, the relevant market for the purpose of the assessment of damages, in the case of non-delivery, is the market price at the place of delivery. (See *Haskell v. Bagot* [1911] and *Aryeh v. Lawrence Kostoris & Son* [1967] 1 Lloyds Rep 63.?

But the question arises in what circumstances will the court hold that the buyer is able to go out and buy equivalent goods. Where the goods concerned are not immediately available or are not near at hand, the question whether the buyer should wait or buy from afar is to be determined by what is reasonable. (See *Lesters Leather and Skin Co. v. Home and Overseas Brokers* [1948] 64 TLR 569 (CA) - "the buyers were not bound to go hunting the globe to find out where they can get snake skins.")

...

"I now turn to consider the crucial question: have the plaintiffs proved their claim for damages as alleged or at all?

With regard to this part of the case, I would preface what I have to say by referring to certain well established principles.

It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

Thus nominal damages may be awarded in all cases of breach of contract. (See *Marzetti v. Williams* [1830] 1 B & Ad 415. And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example, *Dixon v. Deveridge* [1825] 2 C & P 109 and *Twyman v. Knowles* [1853] 13 CB 222.

On the question of the quality of evidence expected of a plaintiff it is well to remember what Devlin J said in *Biggin v. Permanite* [1951] 1 KB 422, 438 namely, "where precise evidence is obtainable, the court naturally expects to have it, where it is not, the court must do the best it can." Nevertheless, it remains true to say that generally "difficulty of proof does not dispense with the necessity of proof" (see *Aerial Advertising Co. v. Batchelors Peas* [1938] 2 All ER 788, 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v. Curtin* [1971] WLR 1731 (CA) in which the plaintiff claiming for diminution of profits of his one man business failed in his claim even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given. (See para. 345 *McGregor on Damages*, 15th Edn.).

...

Looking back, in making their claims for damages the plaintiffs were making three assumptions or impliedly relying on three propositions. These were:

(1) that they had a market for the garments the subject of the 26 contracts.

(2) that this market value had been properly proved.

(3) that this market value of the garments not delivered under the 26 contracts was the proper basis for an award of damages.

In my view, the second and third of these propositions or assumptions were mistaken.

The normal course of proving market value in the case of a resale of goods in bulk would be to call the customers or at the least (and if the parties agree to documentary proof) to tender documents showing the existence of and a dealing with such customers. In the case of a (say wholesale) distribution to a number of customers, a plaintiff would at least be required to produce books or documents showing that he had a business in the course of which he might reasonably have distributed these goods and the price he would have obtained. The plaintiffs in this case did none of these things, producing no business books or accounts or documents showing the existence of and a dealing with customers or even income tax returns.

To put it another way, a plaintiff's unsupported assertion or that of his accountant, that he would have got such and such a price for the goods does not prove market value. It must be proved aliunde – that is to say, in order to prove that someone would have been prepared to pay the price, you call the man who would have paid. Any plaintiff can say "I could have sold my goods for $X had it not been for what the defendant did." If that is enough to prove market value, it would, in effect, dispense with proof of quantum altogether.

In all circumstances, reason and justice point to the inevitable conclusion that although the plaintiffs had shown the fact of damage, no evidence or no sufficient evidence has been adduced as to its amount with the perhaps unfortunate result that it is virtually impossible to assess damages. (See *Dixon v. Deveridge* (*ibid*) and *Twyman v. Knowles* (*ibid*)).

In this context, I am remained of Lord Goddard's *dictum* in *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89 quoted with approval by Thomson CJ in *Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56 (CA), namely that:

> plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

Accordingly, all I can do is to make an award of nominal damages of five hundred dollars in US currency that being the currency of the contract. (See *Miliangos v. George Frank* [1953] 1 QB 487 which I hereby do.

(emphasis added)

[71] I also refer to *Sime UEP Properties Bhd v. Woon Nyoke Lin* [2002] 3 CLJ 719, a case concerning a claim for breach of contract by the landlord for failure to provide a kiosk to the claimant. In support of the claim, the claimant produced the projection of the amount of sales that she would have obtained if the tenancy had commenced. The Court of Appeal rejected the said contention concerning damages based on projections alone and stated: A B

> It is clear from the authorities that in order to succeed in claims for damages for loss of profit one must establish the actual losses one would have suffered as a result of the breach. A projection as in this case is not sufficient to establish the would be losses of profit. A venture into a business would not necessarily mean that one can make a profit out of it because there are instances where people suffer losses. Not all businesses end up with a profit. It is clear to us that the respondent failed to establish the expected losses as a result of the breach. C

[72] The above legal proposition continues to be good law as seen in the decision of the Court of Appeal in *Forest Steel Sdn Bhd v. Iconic Gateway Sdn Bhd & Anor And Another Appeal* [2020] 7 CLJ 19 and *Taki Engineering Sdn Bhd v. Dynasty Streams Sdn Bhd* [2015] 1 LNS 1503. D

[73] David Wong Dak Wah JCA (as he then was) in *Taki Engineering Sdn Bhd v. Dynasty Streams Sdn Bhd* (*supra*) had this to say on claims of damages that are based on mere projections: E

> 26. The principles set out by His Lordship Edgar Joseph Jr (as he then was) in the aforesaid case has been followed by this court in *Government of State of Sabah v. Suwiri Sdn Bhd* [2005] 4 CLJ 727 and *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [200711 CLJ 611.
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> 27. The learned Judge's reasoning can be seen in paragraph 47 which reads as follow: F
>
> > It is my considered view that SD2 in his evidence has given a thorough explanation on all the bills to support the defendant's claim. Evidence in the form of original receipts and invoices were tendered in court (see exhibit D102, D103, and D104) G
>
> 28. With respect to the learned Judge, he fell into error when he did not consider the fact that the makers of the aforesaid exhibits were not called to confirm the contents of the same. The learned Judge in *Popular Industries Ltd* (*supra*) makes it quite clear that the evidence must be independent and in this case it must refer to the third party contractors who did the works. Further His Lordship there had also said that the fact that there is no cross examination of admitted evidence, does not ipso facto discharge the burden of proof. What that means is that the evidential value of any proof must acquire a certain standard before a court finds that the burden of proof has been discharged. This court by a majority in *Government of State of Sabah v. Suwiri Sdn Bhd* had this to say: H I
>
> > As for the claim for damages for breach of contract, the respondent must strictly prove its loss or damage. In the present case, the learned JC awarded the respondent RM21,890,113.75 as damages

A for the defendant's alleged breach of contract on the unchallenged evidence of PW2 which appeared to the learned JC to be clear and comprehensive. However, on the evidence, the respondent had failed to prove it. *A profit projection even though unchallenged is not sufficient to establish the would-be losses of profit especially taking into account exigencies, risks and fluctuations in the logging and timber trade* B *which will have an impact on the alleged projected profits (see Sime Properties Bhd v. Woon Nyoke Lin [2002] 3 CLJ 719; KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1).*

29. Applying the above principles, we with respect find that the Respondent had failed to discharge the burden of proof imposed on C them.

(emphasis added)

[74] In this case, I find that the plaintiff has failed to discharge its burden of proof to show that it did suffer any special damages. Firstly, the claim of special damages to the sum of RM460,000 was not supported by any D evidence that the plaintiff had incurred the said expenses. The plaintiff, through its witnesses had only produced evidence of quotations issued by third parties but there was no evidence of actual payments made. These alleged expenses and costs incurred were merely based on quotations and that evidence of the actual amount paid by the plaintiff was not produced.

E

[75] The plaintiff witness alleged that without payment then the company would not have been able to produce its drawings and plans for the alleged structure to be installed at the site. However, I find that this does not discharge the burden that is put on the plaintiff to show that it did incur losses or damages to the sum of RM460,000 as alleged.

F

[76] This failure to prove the damages allegedly suffered by the plaintiff is further exacerbated regarding the alleged claim for loss of profits of RM22,080,000. The only evidence produced were the slides that was presented by Zulkifli Fitri bin Ismail to the board of directors of the G defendant. This on its own is not sufficient to prove any damage suffered by the plaintiff and does not fulfil the requirements of s. 74 of the Contracts Act 1950. I find that this is merely a profit projection. To use the words of David Wong JCA (as he then was):

"A profit projection even though unchallenged is not sufficient to H establish the would-be losses of profit especially taking into account exigencies, risks and fluctuations" in any form of business especially in the current economic climate.

[77] I find that the projection is merely speculative at best. There is no evidence of any bookings or plans by the plaintiff to show an indication as I to the number of events that their clients had agreed to sign up to. There is no evidence of the customers from the plaintiff that had agreed to undertake events at the site.

[78] As I said earlier, the plaintiff itself has not undertaken any plans to promote the said site or even tried to undertake any events at the said site from 23 February 2018 to date. The claims are mere conjectures by the plaintiff.

[79] In the circumstances, I find that the plaintiff had failed to prove any of its claims for damages as alleged in the statement of claim.

Orders Of This Court

[80] Given the above, I dismiss the plaintiff's claim with costs of RM30,000 to be paid by the plaintiff to the defendant subject to allocator.